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Recent Decision

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ADVERSE POSSESSION — MUNICIPAL CORPORATIONS — TITLE TO PROPERTY HELD IN A PROPRIETARY CAPACITY CAN BE DIVESTED BY ADVERSE POSSESSION — *Siejack v. Mayor and City Council of Baltimore.*[1]

In January 1971, the Maryland State Highway Administration (SHA) petitioned for condemnation of the three contiguous parcels of land held by the Siejacks, claiming the lands were necessary for construction of Interstate Route 95.[2] The Siejacks objected that SHA had failed to account for damages to a fourth parcel of land in their possession (hereinafter parcel 4) located in Baltimore County. The Siejacks had been using parcel 4 since 1949 as a private dump, charging customers for the privilege of dumping refuse there. They contended that construction of I-95 would render parcel 4 landlocked and therefore inaccessible.

SHA conceded damage to parcel 4, but disputed the Siejack's sole ownership and moved for a declaratory judgment to determine to whom SHA would be liable — the Siejacks or the City of Baltimore. Although the Siejacks' title to the southern half of parcel 4 was undisputed, Baltimore City claimed title to the northern half of the property (hereinafter 4N). The lower court decided that the City had paramount record title to 4N,[3] but held that the Siejacks had divested the City of title to 4N by adverse possession.[4] On reargument, however, the lower court re-

1. 270 Md. 640, 313 A.2d 843 (1974).

2. "I-95" is part of the National Interstate and Defense Highway System authorized by the Federal-Aid Highways Act, 23 U.S.C. §§ 101–53 (1970). The interstate system is designed to improve the commercial and defense highway network. 23 U.S.C. § 101(b) (1970). The Federal-Aid Highway Act authorizes selection of roadways by the State Highway Departments of each state subject to the approval of the Secretary of Transportation. 23 U.S.C. § 103(e)(1) (1970). The state also has the function of building and maintaining the highways subsidized by federal aid.

3. The Siejacks established record title to all of parcel 4 at least as far back as 1852. Although the Siejacks' deed ostensibly included 4N, the lower court decided that 4N had been included by mistake in the 1852 deed and had never actually been owned by the grantor of that deed. Oral Opinion (T. 231) in Appendix (Volume 1) to Appellant's Brief at E. 7, Siejack v. Mayor and City Council of Baltimore, 270 Md. 640, 313 A.2d 843 (1974). The city traced its title to 4N from a patent granted by Baltimore County to Albert Wehr in 1902. Wehr conveyed the property to the Baltimore County Water and Electric Company which subsequently, in 1921, conveyed 4N to the city. Siejack v. Mayor and City Council of Baltimore, 270 Md. at 643, 313 A.2d at 845.

4. Maryland follows rules for adverse possession established by 21 Jac. 1, c. 16. The claimant must show his possession was actual, notorious, exclusive, hostile, under claim of title or ownership, and continued uninterrupted for a period of at least twenty years. Gore v. Hall, 206 Md. 485, 112 A.2d 675 (1955). *See also* MD. ANN. CODE Real Prop. § 13–113 (1974).

versed its earlier decision and awarded 4N to the City, citing *Messersmith v. Mayor and Common Council of Riverdale*[5] for the proposition that, in the absence of abandonment by the city, private citizens have no right to acquire by adverse possession lands which municipalities hold in trust for the public.

The Court of Appeals unanimously reversed the decision of the lower court and held that 4N belonged to the Siejacks.[6] It was undisputed that the Siejacks had established all the necessary elements of adverse possession.[7] Although agreeing with Baltimore City that land held by municipalities in a public or governmental capacity was not subject to acquisition by adverse possession, the court decided that Baltimore City held 4N in a proprietary capacity and therefore the parcel could be so acquired.

Prior to *Siejack,* the courts had protected land held by a municipal corporation from claims based on adverse possession by applying a theory analogous to sovereign immunity.[8] The primary notion is that time does not run against the sovereign — *nullum tempus occurit regi.*[9] The original

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5. 223 Md. 323, 164 A.2d 523 (1960) (land dedicated as a public park could not be adversely possessed).

6. Siejack v. Mayor and City Council of Baltimore, 270 Md. at 644, 313 A.2d at 845.

7. As the court stated: "one would be hard pressed to find a case in which all of the elements of adverse possession so clearly appear." *Id.,* 270 Md. at 644, 313 A.2d at 845–46.

8. Although this paper deals only with adverse possession, it should be noted that there is much in common between adverse possession and prescription, so much so that courts have tended to use the terms interchangeably. Technically, however, prescription deals with adverse *use* of land and the acquiring or incorporeal heriditaments while adverse possession deals with possession and the acquiring of title in fee simple. Prescription looks to adverse, continuous and exclusive use of land for a period of twenty years. Such uninterrupted use has led to the presumption of an immemorial lost grant to the property. The presumption of a lost grant is rebuttable where it can be proven that the immemorial grantor lacked capacity to transfer property. The state has no power to grant lands it holds in trust for the public except by proper enabling legislation (*see* notes 41–47 and accompanying text *infra*). Since the state and its subdivisions have no power to grant, then no deed could possibly have passed to the person using the land, and therefore prescription cannot run against public property. *E.g.,* Brady v. Mayor and City Council of Baltimore, 130 Md. 506, 101 A. 142 (1917) (prescription will not run against street in continuous use); Cushwa v. Williamsport, 117 Md. 306, 83 A. 389 (1912) (town commons). *See also* Sterling v. Sterling, 211 Md. 493, 128 A.2d 277 (1957) (although *Sterling* speaks in terms of adverse possession, the decision is phrased in terms of the municipal corporation's inability to grant an island under navigable water, a discussion more reminiscent of the lost grant analysis in prescription). Other jurisdictions follow the same general rule. *E.g.,* Cotrone v. City of New York, 38 Misc. 2d 580, 237 N.Y.S.2d 487 (1962) (since it was impossible for the city to grant an easement, no interest could pass by prescription). It might be argued that if a lost grant can be presumed, that lost enabling legislation could also be presumed. No jurisdiction has been willing to take this extra step.

9. This maxim was adopted in Baldwin v. Trimble, 85 Md. 396, 37 A. 176 (1897), although the result in that case was that the city was divested of land by

justification for the principle was that the King was too busy to police his domain thoroughly and therefore should not be punished for the negligence of his servants who failed to eject trespassers. When the American colonies became independent in 1776, this immunity passed to the states. Representative governments, in continuing to justify *nullum tempus occurit regi,* maintain that the state now acts as trustee of land for the public. Therefore, no individual should have the right to divest the holdings of the remaining members of the public because of the carelessness of state officers who failed to protect public property.[10] Municipal corporations,[11] subdivisions of the state created for efficient management of governmental affairs, have been beneficiaries of this incident of sovereign immunity.[12]

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equitable estoppel. *See also* 10 E. MCQUILLAN, MUNICIPAL CORPORATIONS § 28.55 (3d ed. 1966) [hereinafter cited as MCQUILLAN]; 4 H. TIFFANY, REAL PROPERTY § 1170 (1939); Jarrad, *Adverse Possession of Municipal and County Property Held for Proprietary Purposes: The Unique Georgia Development,* 7 GA. ST. B.J. 482 (1971).

10. United States v. Thompson, 98 U.S. 486, 489 (1878); Ralston v. Town of Weston, 46 W. Va. 544, 33 S.E. 326 (1899). Apart from, yet complimentary to, the reasoning that the public should be protected from incompetent officials, the maxim has also been justified on the theory that any occupation of public land creates a nuisance, and no such unpoliced nuisance should be allowed to ripen into title by the mere passage of time. Ralston v. Town of Weston, *supra;* Baldwin v. Trimble, 85 Md. 396, 37 A. 176 (1897). *See also* Dudley v. Clark, 255 Mo. 570, 585, 164 S.W. 608, 612 (1914), where the court stated:

> Prior to that statute [a statute preventing adverse possession of public land] this state had, through its statutes, adopted the public policy of allowing the limitations to run against the states and municipalities. It was found to be a ruinous public policy, for under it school lands, roads, parks, streets, etc., were lost to the state and public through the laches or ignorance of the public or of officials representing it. Is it not learned at the fireside that what is everybody's business is nobody's business?

11. Municipal corporations are public local corporations exercising some function of government. The term applies to counties, cities, towns or villages or any other organization chartered as a municipal corporation under the laws of a given state. 1 MCQUILLAN § 207a. For the statutes covering municipal corporations in Maryland, *see* MD. ANN. CODE art. 23A (1973) (generally); MD. ANN. CODE art. 23B (1973) (charters); and MD. CONST. art. XI (City of Baltimore). Baltimore City is recognized as a separate political entity similar in character to the several counties. Pressman v. D'Alesandro, 211 Md. 50, 125 A.2d 35 (1956).

12. The rule that municipal property will be protected from adverse possession has been accepted in numerous Maryland cases, *e.g.,* Desch v. Knox, 253 Md. 307, 252 A.2d 815 (1969); Mayor and City Council of Baltimore v. Chesapeake Marine Ry. Co., 233 Md. 559, 197 A.2d 821 (1964); Messersmith v. Mayor and Common Council of Riverdale, 223 Md. 323, 164 A.2d 523 (1960); Bond v. Murray, 118 Md. 445, 84 A. 655 (1912); Ulman v. Charles St. Ave. Co., 83 Md. 130, 34 A. 366 (1896). Most other states follow the Maryland rule, *e.g.,* Board of Education of the City and County of San Francisco v. Martin, 92 Cal. Rep. 209, 28 P. 799 (1891). A minority of jurisdictions allow adverse possession against all land held by a municipal

Although municipal land has not been subject to adverse possession, municipal corporations have suffered divestment of their property on the basis of equitable estoppel.[13] If a municipal corporation represents that it has no interest in a parcel of land, and a private party relies on such representations by occupying or using the land, the municipal corporation can be estopped from claiming any interest in the property. The leading Maryland case for equitable estoppel is *Baldwin v. Trimble*.[14] Baldwin sought specific performance of a contract to sell land. Trimble claimed that Baldwin lacked merchantable title to part of the property which had once been dedicated as a public street. The court held in favor of Baldwin, concluding that the city was estopped from claiming an interest in the property because it had abandoned the property. No evidence was submitted that the city actually accepted dedication of the street to public use, nor was there any evidence of public use. Other streets had superseded the one in question, and the city had allowed subsequent private construction to block access to the street making its use impossible anyway.

Recent decisions in Maryland have limited the use of equitable estoppel. For the city to be estopped from asserting title to disputed land, the claimant has always had to prove abandonment by the municipal corporation for the period of the statute of limitations.[15] Recent cases, including *Messersmith v. Mayor and Common Council of Riverdale*,[16] have held that the claimant must prove not only abandonment by the municipal corporation, but also an intention to abandon the property.[17] Long con-

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corporation, *e.g.*, Meyer v. Graham, 33 Neb. 566, 50 N.W. 763 (1891) (a town should be able to police public streets to oust trespassers, therefore adverse possession allowed against public street).

13. *See* United Finance Corp. v. Royal Realty Corp., 172 Md. 138, 191 A. 81 (1937); Mayor and City Council of Baltimore v. Canton Co., 124 Md. 620, 93 A. 144 (1915); Baldwin v. Trimble, 85 Md. 896, 37 A. 176 (1897); Kennedy v. Mayor and City Council of Cumberland, 65 Md. 514, 9 A. 234 (1886).

14. 85 Md. 396, 37 A. 176 (1897).

15. *Id.*, Mayor and City Council of Baltimore v. Chesapeake Marine Ry. Co., 233 Md. 559, 197 A.2d 821 (1964).

16. 223 Md. 323, 104 A.2d 523 (1960).

17. *Id.* (municipal corporation had never intended to abandon city park which claimant had occupied as part of his front yard). *See also* Mayor and City Council of Baltimore v. Chesapeake Marine Ry. Co., 233 Md. 559, 197 A.2d 821 (1964) (railroad failed to show that Baltimore had abandoned a particular street). For the city to be estopped from claiming an easement in the street, the adverse claimant must prove an intention by the city to abandon the easement and actual abandonment for the prescriptive period. Prescription begins to run only from the moment of abandonment, not necessarily from the moment of initial exclusive adverse use. 233 Md. at 576, 197 A.2d at 829. Also, although reliance on assurance of city officials that lead an adverse claimant to suffer significant financial harm may be grounds for estoppel, no estoppel will be permitted unless the assurance relied upon came from an official acting within his proper scope of authority. All persons dealing with a municipal corporation have the burden of ascertaining the scope of authority of the official with whom they are dealing. 233 Md. at 580, 197 A.2d at 831–32.

tinued municipal non-user is ineffective absent such intention to abandon. Requiring proof of intention to abandon has obviously increased the burden of one adversely claiming property against a municipal corporation.[18]

Siejack is the first Maryland adverse possession case in which a governmental-proprietary distinction has been used to divest a municipal corporation of property. Courts have long held that municipal corporations have a proprietary as well as governmental personality.[19] When the municipal corporation acts in its governmental capacity, it acts as an agent of the state on behalf of the general public, and therefore, must be treated as the state would be treated in like circumstances. When the municipal corporation acts in a "proprietary" capacity, it does not assume the personality of the state, rather it is treated as any private corporation.[20]

Maryland has applied the governmental-proprietary distinction to cases involving tort liability,[21] eminent domain,[22] taxation,[23] and land alienation.[24] In applying the distinction, however, Maryland courts have established no clear rule for determining what functions or property belong to either class. For instance, in a tort case, the operation of a waterworks was deemed a proprietary function;[25] yet for purposes of taxation, a waterworks was held to be governmental property and there-

18. The Siejacks also failed in the lower court on a claim of equitable estoppel since they did not prove the city had intentionally abandoned 4N. Oral Opinion (T. 279) in Appendix (Volume 1) to Appellant's Brief at E. 8, Siejack v. Mayor and City Council of Baltimore, 270 Md. 640, 313 A.2d 843 (1974). The Court of Appeals suggested, without deciding, that "evidence pointing in [the] direction" of abandonment existed. They did not discuss the problem of intent however, but simply recounted facts of municipal non-user. 270 Md. at 646, 313 A.2d at 847. What the court meant by including this dictum is unclear.

19. The distinction has been recognized in Maryland at least as far back as 1864. *See* County Commissioners of Anne Arundel County v. Duckett, 20 Md. 468 (1864). *See also* Seasongood, *Municipal Corporations: Objections to the Governmental or Proprietary Test,* 22 VA. L. REV. 910 (1936); Doddridge, *Distinction Between Governmental and Proprietary Functions of Municipal Corporations,* 23 MICH. L. REV. 325 (1925).

20. *See* 1 MCQUILLAN § 2.09.

21. *See, e.g.,* Eyring v. City of Baltimore, 253 Md. 380, 252 A.2d 824 (1969); County Comm'rs of Harford v. Love, 173 Md. 429, 196 A. 122 (1938); Mayor and City Council of Baltimore v. State, *ex rel.* Blueford, 173 Md. 267, 195 A. 571 (1937). *See also* Note, *Municipal Responsibility in Tort,* 3 MD. L. REV. 159 (1939).

22. *See, e.g.,* Herzinger v. Mayor and City Council of Baltimore, 203 Md. 49, 98 A.2d 87 (1953); Riden v. Phila., B. & W.R.R. Co., 182 Md. 336, 35 A.2d 99 (1944). *See also* Ghingher and Ghingher, *A Contemporary Appraisal of Condemnation in Maryland,* 30 MD. L. REV. 301 (1970).

23. Anne Arundel County v. Annapolis, 126 Md. 445, 95 A. 40 (1915).

24. *See, e.g.,* Montgomery County v. Maryland-Washington Metro. Dist., 202 Md. 293, 96 A.2d 353 (1953).

25. Wallace v. Mayor and City Council of Baltimore, 123 Md. 638, 91 A. 687 (1914).

fore not subject to taxation.[26] Likewise, roads have been classified as proprietary in tort cases,[27] and governmental in land alienation cases.[28]

Siejack also fails to define clearly the proprietary concept. The court does state that the acquisition of "proprietary" property by adverse possession should extend no further than the case at bar or a "future case having a similar factual background."[29] Those facts provided an extreme example of municipal non-user. The city had originally purchased 4N as part of a larger transaction with the Baltimore Water and Electric Co., pursuant to a plan by which the city would provide for its own water needs. To avoid the injustice of a partial taking of only those lands directly in the business of supplying water to Baltimore, the city condemned all of the holdings of the Baltimore Water and Electric Co. Parcel 4N was a holding having no material connection to the provision of water to Baltimore City. The city had made no subsequent use of 4N and had been aware of the Siejacks' use of the property.[30]

A number of other jurisdictions, with some exceptions,[31] have applied the governmental-proprietary distinction to adverse possession cases.[32] These jurisdictions agree that streets and other public roadways definitely fall within the "governmental" category and are not therefore subject to adverse possession.[33] Beyond this, they are incon-

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26. Anne Arundel County v. Annapolis, 126 Md. 445, 95 A. 40 (1915).

27. *See, e.g.,* Mayor and City Council of Baltimore v. Eagers, 167 Md. 128, 173 A. 56 (1934).

28. *See, e.g.,* Montgomery County v. Maryland-Washington Metro. Dist., 202 Md. 293, 96 A.2d 353 (1953). The apparent absurdity in application can only be resolved by examining the purpose for which the distinction was created. The governmental proprietary distinction was created in order to avoid injustices caused by technical defenses of a municipal corporation due to its affiliation with the state. *See* City of Trenton v. State of New Jersey, 262 U.S. 182, 191 (1923). The distinction has allowed the court a theory by which it can temper those technicalities with public policy considerations. For instance, courts have been more willing to characterize municipal functions as proprietary in tort cases in order to avoid sovereign immunity and expand municipal liability. For purposes of eminent domain, the courts have tended to characterize municipal uses of land as public and therefore governmental. The courts have thus given municipal corporations considerable leeway in obtaining property which can only be condemned for public use. Applying the governmental-proprietary distinction in adverse possession cases therefore requires careful assessment of the policies for protecting municipal land.

29. Siejack v. Mayor and City Council of Baltimore, 270 Md. at 644, 313 A.2d at 846.

30. 270 Md. at 645–46, 313 A.2d at 847.

31. *See, e.g.,* Grand Lodge of Georgia, I.O.O.F. v. City of Thomasville, 226 Ga. 4, 172 S.E.2d 612 (1970); Farrow v. Charleston, 169 S.C. 373, 168 S.E. 852 (1933).

32. Although only a few states have actually applied the rule, *e.g.,* Long Island Land Research Bureau v. Town of Hempstead, 283 App. Div. 663, 126 N.Y.S.2d 857 (1954), most states accept the principle that property held in a proprietary capacity is subject to adverse possession. 10 MCQUILLAN § 28.55.

33. *E.g.,* Turner v. Commissioners of Hillsboro, 127 N.C. 153, 37 S.E. 191 (1900). *See also* 10 MCQUILLAN § 28.55.

sistent in their application of the governmental-proprietary distinction. A majority of these jurisdictions look to some form of municipal non-user as a means of characterizing property as proprietary for purposes of adverse possession.[34] For instance, adverse possession has been allowed against land which has never been used, nor intended to be used;[35] land dedicated to public use, but never subsequently used;[36] and land once in use, but no longer used.[37]

Since non-user is pertinent in determining whether municipal land is alienable without legislative authority,[38] some jurisdictions which look to non-user have viewed it as a first step in finding property alienable. They have then concluded that if the land could be alienated without state legislative enactment, the land should also lose its shield against adverse possession.[39]

Maryland adverse possession cases have also made analogies to municipal alienation cases. *Messersmith v. Mayor and Common Council of Riverdale,*[40] held that since parkland was inalienable without specific legislative consent, it was therefore governmental and subject neither to unauthorized sale nor loss by adverse possession. Likewise, in attempting to define proprietary, the court in *Siejack* referred to definitions enunciated in prior alienation cases;[41] however, it was unwilling to extend the more expansive meaning of proprietary in alienation cases to adverse possession.

The general rule in Maryland is that proprietary property, for purposes of alienation, includes all property not dedicated to public use nor held in trust for the public.[42] Municipal corporations have the implied

34. A minority of jurisdictions, applying definitions of public and proprietary developed in tort cases, allow adverse possession of land still in use. *See* Oklahoma City v. Pratt, 185 Okla. 637, 95 P.2d 596 (1939) (parkland); Ebell v. City of Baker, 187 Ore. 427, 299 P. 313 (1931) (property in use by the city waterworks).

35. Goldman v. Quadrato, 142 Conn. 398, 114 A.2d 687 (1955); Long Island Land Research Bureau v. Town of Hempstead, 283 App. Div. 663, 126 N.Y.S.2d 857 (1954); Brown v. Fisher, 193 S.W. 357 (Tex. Civ. App. 1917).

36. Turner v. Commissioners of Hillsboro, 127 N.C. 153, 37 S.E. 191 (1900); Ames v. City of San Diego, 101 Cal. 390, 35 P. 1005 (1894); City of Bedford v. Willard, 133 Ind. 562, 33 N.E. 368 (1893). *Cf.* Henry Cowell Lime & Cement Co. v. State, 18 Cal. App. 2d 169, 114 P.2d 331 (1941) (land improperly dedicated to public use).

37. *See* Brown v. Trustees of Schools, 224 Ill. 184, 79 N.E. 579 (1906).

38. *See* notes 41–47 and accompanying text *infra.*

39. *See* Long Island Land Research Bureau v. Town of Hempstead, 283 App. Div. 663, 126 N.Y.S.2d 857 (1954); Pioneer Investment and Trust Co. v. Board of Education, 35 Utah 1, 99 P. 150 (1909); Turner v. Commissioners of Hillsboro, 127 N.C. 153, 37 S.E. 191 (1900); Ames v. City of San Diego, 101 Cal. 390, 35 P. 1005 (1894); City of Bedford v. Willard, 133 Ind. 562, 33 N.E. 368 (1893).

40. 223 Md. 323, 327–28, 164 A.2d 523, 525–26 (1960).

41. 270 Md. 640, 644, 313 A.2d 843, 846.

42. McRobie v. Mayor and Commissioners of Westernport, 260 Md. 464, 272 A.2d 655 (1971); Mayor and City Council of Baltimore v. Chesapeake Marine Ry.

power[43] to alienate all such proprietary property without legislative enactment.[44] The rationale for this power appears to be the promotion of efficient local government. Municipal officials are prevented from squandering property for which they should be acting as trustees, but they are free to deal with lands no longer having any use to the public. Whether municipal property is proprietary and therefore alienable is thus directly related to municipal non-user.[45]

In *Montgomery County v. Maryland-Washington Metro. Dist.*,[46] Montgomery County attempted to rescind a prior transfer of land to the Park and Planning Commission claiming that the County, which had originally purchased the land as a site for a future county office building, specifically dedicating that land to public use, had no right to sell land dedicated to public use. The court rejected the county's theory, noting that the property, although dedicated to public use, had never actually been used by the public. The court held that a municipal corporation has power to sell land purchased for a public use when in fact the land has never been so utilized.[47] Other jurisdictions also look to municipal non-

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Co., 233 Md. 559, 197 A.2d 821 (1964); Messersmith v. Mayor and Common Council of Riverdale, 223 Md. 323, 164 A.2d 523 (1960); Montgomery County v. Maryland-Washington Metro. Dist., 202 Md. 293, 96 A.2d 353 (1953).

43. The powers given municipal corporations are limited to those expressly given, those necessarily or fairly implied from the powers given, and those necessary to accomplish the purposes of the corporation. 1 J. DILLON, MUNICIPAL CORPORATIONS § 237 (5th ed. 1911), cited in McRobie v. Mayor and Commissioners of Westernport, 260 Md. at 466, 272 A.2d at 656; Montgomery County v. Maryland-Washington Metro. Dist., 202 Md. at 304, 96 A.2d at 358.

44. Montgomery County v. Maryland-Washington Metro. Dist., 202 Md. at 305, 96 A.2d at 358. *See also* McRobie v. Mayor and Commissioners of Westernport, 260 Md. at 467, 272 A.2d at 657. A municipality's divesting itself of governmental property is not always precluded. As has been stated, a municipal corporation can obtain specific governmental permission to supplement its charter powers. It has also been suggested that municipal corporations, if they have been granted home rule pursuant to the home rule amendments, MD. CONST. art. XI-A (for counties and Baltimore City) or art. XI-E (towns, cities, etc.), can amend their own charters allowing sale of governmental property. No case has so held yet, although *McRobie* in dicta suggested this option. McRobie v. Mayor and Commissioners of Westernport, 260 Md. at 470, 272 A.2d at 658. *See also* Moser, *County Home Rule — Sharing the State's Legislative Power with Maryland Counties*, 28 MD. L. REV. 327 (1968).

45. If, however, the land is held in public trust, the land cannot be alienated without specific legislative consent even if it is not in use by the public. What precisely constitutes land subject to public trust is unclear, although it has been suggested that the term at least includes streets, alleys, public squares, commons, parks, and wharves. McRobie v. Mayor and Commissioners of Westernport, 260 Md. at 467-68, 272 A.2d at 657, citing 10 MCQUILLAN § 28.38. *Accord,* Messersmith v. Mayor and Common Council of Riverdale, 253 Md. 323, 164 A.2d 523 (1960) (parkland, although not apparently in public use, could not be alienated).

46. 202 Md. 293, 96 A.2d 353 (1953).

47. 202 Md. at 302-06, 96 A.2d at 359. *See also* in McRobie v. Mayor and Commissioners of Westernport, 260 Md. 464, 469, 272 A.2d 655, 658 (1971), where a

user in determining alienability and some allow municipal corporations to alienate land in excess of the public need.[48]

Municipal non-user is therefore an important factor in determining whether municipal land is proprietary, in both adverse possession and alienation cases. Although there are similarities, it is probably incorrect to conclude that land subject to alienation should also necessarily be subject to acquisition by adverse possession. A strict analogy between alienation and adverse possession ignores the fact that municipal corporations can only alienate property for an adequate consideration.[49] When a municipal corporation alienates "proprietary" holdings, the public has a beneficial interest in the value of the consideration received for the conveyance. The public gains no reciprocal benefit from land simply donated, or from land lost by adverse possession.[50]

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municipal parking lot was deemed in the public trust and therefore inalienable, the court suggested that non-user need not be absolute for land to be alienable:

> Finally, as with the proverbial glass of water, it makes no difference whether the lot was a little more than half empty or a little less than half full. The test of public use is not whether the lot is used at all times to capacity, but whether it is utilized to a substantial degree.

48. *E.g.*, Southeastern Greyhound Lines, Inc. v. City of Lexington, 299 Ky. 510, 186 S.W.2d 201 (1945) (land bought for a municipal auditorium, but never used); Schneider v. West New York, 84 N.J. Super. 77, 201 A.2d 63 (1964) (land acquired for park, but never used).

49. *See* Montgomery County v. Maryland-Washington Metro. Dist., 202 Md. at 306, 96 A.2d at 359 (although county has implied power to sell for consideration land not in public use, they have no power to donate that land). The rule is accepted by other jurisdictions. *E.g.*, Hackett v. Trustee of Schools, 398 Ill. 27, 74 N.E.2d 869 (1947); Ward v. City of Roswell, 34 N.M. 326, 281 P. 28 (1929); 10 McQUILLAN § 28.37.

50. Note also that if by "proprietary" the court simply means any land not dedicated to public use or land not in the public trust, the court might have determined that parcel 4N was proprietary by another method. In Northern City Ry. v. Mayor and City Council of Baltimore, 133 Md. 658, 106 A. 159 (1919), Baltimore City had attempted to condemn land held by the Northern City Railway. The city wished to use the land as an alley. The land was being used by the railroad for a tool house, a car inspector's house, and a storage siding. The court held that Baltimore had no right to condemn the railroad's land, because the railroad was making a public use of the property. As the court stated:

> It is a firmly settled principle of the law of eminent domain that when land has once lawfully become appropriated to a public use it cannot be thereafter condemned for such an inconsistent user unless authority for such later appropriation has been conferred directly [by the legislature] or by necessary implication.

133 Md. at 660, 106 A. at 159. *See also* MD. ANN. CODE art. 89B, § 7(b) (1973) which empowers SHA to condemn only land in private use.

Given the principle that land in public use cannot be condemned, the mere fact that the city did not contest the taking of parcel 4N could be understood as a waiver by the city of any claim that the land was held in a public capacity. The city proceeded as an owner of land, which had a right to be recompensed for condemnation. Impliedly they admitted they held the land in a private capacity, since only private land could be condemned.

Several interests should be weighed in determining whether acquisition of land by adverse possession should be allowed in a particular case.[51] First, the argument that the public should not lose its property through the ineptitude or corruption of its officials has considerable merit. Although the public should not be punished for the ineptitude of public servants, neither should a reluctance to allow adverse possession encourage slovenliness in the management of public land. Moreover, public policy should favor beneficial use of land that otherwise might have been neglected.

Siejack limits acquisition by adverse possession to holdings similar to the parcel in question which had been purchased by the city for no particular purpose and had never been utilized. Although the property had not been technically abandoned, since abandonment requires a showing of intent to abandon, parcel 4N was certainly an extreme example of municipal non-user. The property was both neglected and of little apparent use to the city. By whatever definition imaginable, Baltimore held the forlorn 4N in a proprietary capacity.[52] Plaintiffs, furthermore, had been making a beneficial use of the property, providing a dumping area for city and county refuse.[53]

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51. As was stated earlier, *see* note 28 *infra*, exceptions to municipal immunities and defenses, found by distinguishing a governmental and proprietary personality within each municipal corporation, are rooted in policy considerations. The real object for allowing an exception to the rule prohibiting adverse possession to run against a municipal corporation lies in maximizing the public interest. The fact that maximization of the public interest underpins the solution of the problem of adverse possession is evidenced by the court's holding in Town Commissioners of Centreville v. County Commissioners of Queen Anne's County, 199 Md. 652, 87 A.2d 599 (1952). *Centreville* deals with the somewhat different, although analogous, problem of prescription. *See* note 8 *infra*. The court held that the City of Centreville had acquired an easement by prescription in county property, the sidewalks of the county court house square. A dissenting opinion presented the classic rule that prescription, like adverse possession, cannot run against a municipal corporation. The majority distinguished this case however, noting that here both parties were municipal corporations. Since public policy had been a central reason for not allowing divestment of land held in a public trust, and since public benefit in this case seemed best served by allowing Centreville a sidewalk easement to install parking meters for traffic regulation, the court held that a municipal corporation could be dispossessed of public lands by other municipal corporations. Thus public interest transcended any technical rules.

52. The City of Baltimore, in its pleadings, also sought recompense for 4N implying that its interest was alienable and therefore not in the public trust. Answer of Defendant, Mayor and City Council of Baltimore, to the petition for Declaratory Judgment in Appendix (Volume 1) to Appellant's Brief at E. 4, Siejack v. Mayor and City Council of Baltimore, 270 Md. 640, 313 A.2d 843 (1974).

53. There is an obvious problem with this analysis. Although the plaintiffs had arguably been making a beneficial use of the property, they had instigated this action on the grounds they would no longer be able to make continued use of the property because it would be landlocked. After the Siejacks are deemed owners of parcel 4N and are duly compensated by SHA, the public gains nothing from the transaction. In this case, any benefit to the public from the Siejack's use of 4N is only past benefit.

As has been shown, *Siejack* has not explained how far the proprietary concept should extend in adverse possession cases, and it has also been shown that a strict analogy to alienation is inappropriate. Rather than create a new meaning for proprietary for the context of adverse possession, it would be preferable for courts to consider the proprietary nature of the land as one element, rather than the exclusive element, in determining whether land is subject to adverse possession.[54] Adverse possession, therefore, may run against land not held in the public trust, nor dedicated to public use; that is, proprietary holdings as they are presently defined for purposes of alienation. Adverse possession, however, should not necessarily run against these properties. The courts should attempt to protect not only the public's right to use of that land, but also to the value of that land. In special cases though, like *Siejack,* where municipal land is unused and apparently unneeded, and where the adverse possessor's use of the land has conferred some benefit on the public, adverse possession may run against the municipal corporation. Given the severe restrictions created by *Messersmith v. Mayor and Common Council of Riverdale*[55] for proving abandonment on the part of a municipal corporation, *Siejack* offers a method by which unused, if not abandoned, property can be acquired by adverse possession.

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54. The courts should weigh a cluster of factors including the presence of all elements of adverse possession, non-user by the municipal corporation, the actual and potential value of the land to the public, and the nature of the adverse possessor's use of the land.

55. 223 Md. 323, 104 A.2d 523 (1960). *See* notes 15 & 16 and accompanying text *infra.*